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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,  
*Petitioners.*

VS.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN,  
MRS. M. RICHMOND FARRING, ELI FRANK, JR.,  
DR. ROGER HOWELL, HENRY P. IRR, DR. WIL-  
LIAM D. McELROY, MRS. ELIZABETH MURPHY  
PHILLIPS, JOHN R. SHERWOOD, INDIVIDUALLY,  
AND CONSTITUTING THE BOARD OF SCHOOL  
COMMISSIONERS OF BALTIMORE CITY,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF MARYLAND

**PETITIONERS' BRIEF**

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**BRIEF FOR PETITIONERS**

**CITATIONS TO OPINIONS BELOW**

The opinion of the Superior Court of Baltimore City, the court of first impression, is reported in the *Daily Record* (Baltimore), issue of June 12, 1961, and appears at R. 8.

The opinion of the Court of Appeals of Maryland is reported at 228 Md. 239, 179 A. 2d 698, the dissenting opinion at 228 Md. 251, 179 A. 2d 704. These opinions are set forth at R. 26 and R. 36, respectively.

## JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that State, filed April 6, 1962, was entered on that same date (clerk's certificate, R. 47). Jurisdiction of this Court is invoked pursuant to 28<sup>th</sup> U.S.C. Sec. 1257 (3), there having been drawn in question below, and the Petitioners claiming here the matter of the validity of a statute of the State of Maryland upon the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the Petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States. The highest court of the State of Maryland, in its decision, ruled upon these said matters of validity, and of rights, privileges, and immunities, unfavorably to the Petitioners.

### CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE REGULATIONS INVOLVED

This case involves the following:

1. A portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States,

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. A portion of the First Amendment to the Constitution of the United States,

“(Congress) shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;”

3. A part of Article 77, Section 203 of the Annotated Code of Maryland (Michie, 1957) (Referred to in the Memorandum Opinion of the Superior Court of Baltimore City) (R. 3, 8)..

“The Board of Commissioners of public schools of Baltimore City, or by whatever name the body may be known that has supervisory power and control over the public schools of Baltimore City . . .” (shall have certain powers and duties).

Also Section 202 of Article 77, which is by necessary inference a part of Section 203,

“The mayor and city council of Baltimore shall have full power and authority to establish in said city a system of free public schools which shall include a school or schools for manual or industrial training, under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a Board of School Commissioners; . . .”

And also Section 91 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), drawn in by inference by Sec. 202, *supra*,

“Education, Department of, General Powers and Duties. (a) There shall be a Department of Education, the head of which shall be a Board of School Commissioners . . .”

4. Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City,

"Opening Exercises." Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it . . ." (R. 4).

Also, an amendment to the above Rule, adopted November 17, 1960 by the Board, providing that,

"Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian." (R. 4).

5. The compulsory school attendance law of the State of Maryland as contained in Article 77 of the Annotated Code of Maryland (Michie, 1957):

"Sec. 231 (a) *Who must attend.* Every child residing in Baltimore City and in any county in the state between seven and sixteen years of age shall attend some day school regularly as defined in Sec. 233 of this article. . . . Every person having under his control a child between seven and sixteen years of age shall cause such child to attend school or receive instruction as required by this section. . . .

"(b) *Penalty.* Any person who has a child under his control and who fails to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and be fined not exceeding five dollars for each offense."

### QUESTIONS PRESENTED

1. Does the conduct of daily opening exercises in the public schools of Baltimore City, consisting of a reading from the Bible, "and/or" recitation of the Lord's Prayer, as provided for by, and instituted under, Section 6 of Article VI of the Rules of the Board of School Commissioners of that City, which Rules were promulgated under a state statute giving the Board general supervisory powers over schools, violate any constitutional right of the Petitioners which is guaranteed by the Establishment and Free Exercise clauses of the First Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment, or of the Equal Protection clause of the Fourteenth Amendment, even though provision has been made for excusing those pupils who do not wish to participate in the exercises?

2. Has the Rule above mentioned and the practice instituted under it in the public schools of Baltimore City by the Board of School Commissioners deprived the Petitioners of rights, privileges or immunities guaranteed by the Establishment and Free Exercise clauses of the First Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment?

3. Is the decision below, holding the Rule and practice complained of to be constitutional, in conflict with the decisions of this Court concerning the free exercise of religion, the passage of laws respecting an establishment of religion, and concerning the separation of Church and State?

## STATEMENT OF THE CASE

The case was heard in the court of first impression without testimony, upon a demurrer to a petition for the issuance of the writ of mandamus commanding the Respondents herein to "rescind and cancel the . . . Rule" concerning opening exercises, "and to cause (the) teachers in Baltimore City to discontinue the practice and exercise . . . set forth." (R. 7).

The petition for mandamus (R. 3) alleged the state citizenship and residence of the Petitioners, the status of the adult Petitioner as a taxpayer and of the Infant Petitioner as a student; that both were subject to the compulsory school attendance statute of the state; the supervisory power of the Defendants over the public schools in question; the existence of the Rule promulgated by the Defendant Board of School Commissioners requiring the conduct of a daily sectarian religious "opening exercises", consisting of the reading, without comment, of one chapter of the Bible "and/or" recitation of the Lord's Prayer; and the enforcement of the Rule by the Defendants to the detriment of the Petitioners; the contravention of the rights of the Petitioners to freedom of religion under the First and Fourteenth Amendments and the violation of the principle of separation of Church and State; the violation of the constitutional rights of the Petitioners by threatening their religious liberty; the averment that the provision for being excused in no wise negated nor mitigated the violation and infringement of the Petitioners' constitutional rights; and the averment of the ill effects which the Infant Petitioner experienced as a result of his forced choice to be excluded from the exercises; the deprivation of equality under the laws; and the request to, and the refusal of, the Defendants that they cease from the religious practice protested against.

The Defendants demurred to the petition on the ground that mandamus was not the proper form of action, and that the petition stated no grounds for relief, on the theory that the questioned practice was not violative of the federal Constitution. Thereby, in law, the Defendants admitted the truth of all well-pleaded facts alleged in the petition.<sup>1</sup>

The demurrer was sustained by the *nisi prius* tribunal without leave to amend, the petition dismissed and judgment absolute for costs entered against the Petitioner (R. 2).

The Maryland Court of Appeals upheld that decision by a 4 to 3 majority, and the Petition for Certiorari herein was then filed.

Both the Infant Petitioner and the Individual Petitioner, his mother, are atheists (R. 4). The Infant Petitioner attends the public schools of Baltimore City (R. 3). The Defendant School Board is by statute charged with supervision and control of the Baltimore City public schools (R. 3). Under its rule making authority the Board established the disputed rule many years ago making the conduct of a short religious ceremony mandatory at the opening of each day of school.

The Petitioners, before filing their action below, had requested the Board to rescind its rule and to direct that the practice of holding the ceremony be discontinued by the teachers under its control. The practice was not stopped, nor the rule changed (R. 6). However, the Board did amend the rule so as to allow any pupil to be

<sup>1</sup> *Murray et. al. v. Curtlett et. al.* 228 Md. 239, 252, 179 A2d 698, 705. (This statement found in dissenting opinion. *Hillyard v. Cherry Chase Village*, 1958, 137 A2d 555, 215 Md. 213; *Walker v. D'Alessandro*, 1955, 126 A2d 148, 212 Md. 163; *Mahoney v. Board*, 1954, 108 A2d 143, 205 Md. 325.

excused from attendance at the exercises upon presenting the written request of his parent or guardian (R. 4). This the Infant Petitioner did, but thereafter, he suffered "loss of caste with his fellows, (was) regarded with aversion, and . . . subjected to reproach and insult", and was alleged to be subject to certain other substantial disadvantageous effects which followed from his exclusion from the classroom religious ceremony (R. 6). "Therefore, upon the religious practice being continued as before (though without the Infant Petitioner's presence in the classroom), the action was brought.

### SUMMARY OF ARGUMENT

The questions herein are all within the compass of *Engel v. Vitale*<sup>2</sup> and *Torcaso v. Watkins*.<sup>3</sup>

For the public schools to require, daily, the recital of the Lord's Prayer or the reading of verses from the Bible, is unconstitutional under both the Free Exercise and the Establishment clauses of the First Amendment. The exercises are clearly sectarian and religious and the situation is *a fortiori* that discussed by this court in *Engel v. Vitale*, which concerned a more innocuous prayer, not taken from any particular religion, but merely composed and sanctioned by the school authorities, and did not involve a reading from a holy book.

### ARGUMENT

#### 1. That to which the Petitioners Do Not Object

The Petitioners wish to point out to the Court that they expressly disclaim any objection to such matters as the

<sup>2</sup> 370 U.S. 421

<sup>3</sup> 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982

use, in classes, of literature having a religious background, including the Bible in all or any of its versions, when such material is presented and discussed as literature or history; and to the discussion in class of religious history as history; and to the presentation of such subjects as comparative philosophy or comparative religion when presented as sociology, history, or philosophy, and not as a teaching of a specific religion; and to the display of religious symbols upon the person of students, or even in and about the school when such school display is made as decoration of an artistic nature, and not in the form of a religious devotional object; or to music in music classes or elsewhere though such music may have a religious history, or a religious connotation to some, provided it is presented or studied as music and not as a religious teaching. The Petitioners do not, in short, wish to curtail objective study or discussion of any subject, including religion, in the public school. What the Petitioners do object to is the sanctioning of favor for religion as opposed to non-religion, and to the conduct of religious teachings, whether such teachings be called sectarian or whether they be called non-sectarian.

## 2. In General

*My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.*

*The day that this country ceases to be free for irreligion it will cease to be free for religion — except for the sect that can win political power. . . . We start down a rough road when we begin to mix compulsory public education with compulsory godliness.*

So spoke Mr. Justice Jackson, dissenting, in *Zorach v. Clauson*, 72 S. Ct. 679, 343 U.S. 306, 96 L. Ed. 978. He also said:

*"I . . . challenge the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic."*

Mr. Justice Jackson has stated the Appellant's principle argument, and Mr. Justice Black has reiterated it in *Engel v. Vitale*, 370 U.S. 421, 435, in stating that,

*"It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."*

And at p. 430,

*" . . . the fact that the program, as modified and approved by state courts does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's Constitutional defects. Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom."*

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. *This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve the coercion of such individuals.* When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. . . .” (Emph. supp.)

### 3. The Lord's Prayer Is Sectarian

The Lord's Prayer is not “denominationally neutral” as the Regent's Prayer in *Engel v. Vitale* was claimed to be, *Engel v. Vitale, supra*, at 430. It is a Christian form of worship.<sup>4</sup>

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<sup>4</sup> “The Lord's Prayer (was) taught by Jesus to his Disciples (and) appears in two forms in the New Testament. The briefer, and probably older form is Luke 11:2-4. The longer form in Matthew 6:9-13 shows greater liturgical fulness, and ends with a doxology which was probably added in the first century to round out the prayer for public worship. Though the doxology appears in some versions of Matthew's Gospel and in the King James version, it is not found in the oldest and best Greek MSS., and is not included in the American Standard version or the Revised Standard version, except in a footnote.

“The context of the prayer differs in the two Gospels. In Matthew it is given as a model of prayer: ‘after this manner therefore pray ye’ (6:9); and it illustrates the teaching about prayer in the Sermon on the Mount (6:1-8). In Luke it is a form to be used: ‘When ye pray, say . . .’ (11:2). Here it is represented as Jesus' response to a disciple's request, ‘Lord, teach us to pray, as John also taught his disciples.’

It occurs twice in the New Testament. The fuller and more beautiful form is a part of the Sermon on the Mount<sup>5</sup>; the shorter version is found in St. Luke.<sup>6</sup> Catholic and

(cf. 5:33).” Harper’s Bible Dictionary by Miller & Miller (Harper & Bros., 1952), pp. 398-9.

K. Kohler, in *The Jewish Encyclopedia*, vol. 8, pp. 183-4 expresses the opinion that the Lord’s Prayer as it now stands is an insertion in Matthew from Didache 8:2 (a Christian manual of the 2nd century), and that the passage originally contained a saying identical with Mark 11:25, since the sequel in Matt. 6:14-15 is the same as Mark 11:26.

“The Lord’s Prayer has come to us from Jesus himself, and has always lain at the very heart of his religion. Churches have differed widely in every matter of doctrine and ritual and government, but all unite in the Lord’s Prayer. There has never been a time when it was not daily repeated by all Christians, alike in their common worship and their private devotion. It is the watchword by which they recognize each other, whatever may be their race or calling or their plane of culture. . . .” *The Lord’s Prayer*, E. F. Scott, D. D. (Scribner’s, 1951), p. 1.

“In both the Old Testament and the New there is a climactic point; . . . In the Old Testament it is the Ten Commandments. . . . In the New Testament it is the Lord’s Prayer, which lays foundations for the harmonious inner life, as the Ten Commandments do for the outer. Here speaks the aspiring spirit to its Maker. This is the love-song of the Christian world.” *The Lord’s Prayer*, George Herbert Palmer (Prof. Emer., Harvard) (Pilgrim Press, 1932), p. 3.

<sup>5</sup> Matt. 6:9-13: “Alter this manner therefore pray ye: Our Father which art in heaven, hallowed be thy name. Thy kingdom come. Thy will be done in earth, as it is in heaven. Give us this day our daily bread. And forgive us our debts, as we forgive our debtors. And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, forever. Amen.”

<sup>6</sup> Luke 11:2-4: “And he said unto them, When ye pray, say, Our Father which art in heaven, Hallowed be thy name. Thy kingdom come. Thy will be done, as in heaven, so in earth. Give us day by day our daily bread. And forgive us our sins; for we also forgive every one that is indebted to us. And lead us not into temptation; but deliver us from evil.”

Protestant forms differ substantially<sup>7</sup>. The prayer is held by many authorities to owe much to Jewish liturgy and literature<sup>8</sup>, but is not generally regarded by Jewish clerics,

<sup>7</sup> Matt. and Luke op. cit., but in the Douay version of the Bible.

<sup>8</sup> Cf. for example I. Chron. 29:11: "Thine, O Lord is the greatness, and the power, and the glory, and the victory, and the majesty: for all that is in the heaven and in the earth is thine; thine is the kingdom, O Lord, and thou art exalted as head above all."

The Universal Jewish Encyclopedia (1942), Vol. 7 pp. 193-4 in an article by Rabbi Felix A. Levy, states "The composition of such a prayer by Jesus was not in itself a novelty, as private prayers of this type were not uncommon additions to the formal service in Judaism and a number have been recorded (*Tos. Ber.* 3:7; *Ber.* 16b et seq.; *Yer. Ber.* iv, 7d) . . . . On the whole, with one or two possible exceptions, the Lord's Prayer may be said to have a Jewish tone. The Matthew verses resemble the opening phrases of the Kaddish prayer: Magnified and sanctified be His great name in the world which He hath created according to His will. May He establish His kingdom during your life . . . even speedily and at a near time. . . ."

"The opening words, 'Our Father,' are frequently found in the Jewish liturgy with or without the addition of the words 'in heaven' (Cf. *Chron.* 29:10, the fourth, fifth and sixth of the Eighteen Benedictions; the Abinu Malkenu prayer of The Penitential Days; *Ber.* 5:1; *Yoma* 8:9; *Sotah* 9:15; *Aboth* 5:20 and elsewhere). 'Your name be revered' and following verse are paralleled in the Kaddish and in the Kedushah. The two ideas of the hallowing of God's name and the coming of His kingdom are closely connected, as it was felt that the Messiah would come only when men would acknowledge the holiness of God. Jewish scripture is full of expressions of hope for the speedy coming of this Messianic redemption, and the words proposed by Jesus were based on the lively expectation of the promised kingdom in that very age.

"The next words, 'Your will be done,' are best understood in reference to this same Messianic hope; they are the expression of the trust that God will bring about His Kingdom in His own time. In a later period when the expected Messianic era did not arrive either in the lifetime of Jesus or in the first generations of the Christian church, the statement was first interpreted to refer to the second coming of Jesus (*Luke* 22:18) and then enlarged to include complete submission on

nor by many non-Jewish clerics as being a part of the liturgy of the religion of the Jews.<sup>9</sup>

the part of man to the will of God. This idea of submission is expressed frequently in Jewish literature, for instance in the prayer of Eliezer ben Hyrcanus recorded in the *Tosefta*: 'Do Thy will in Heaven above; grant tranquillity of spirit to those who fear Thee on earth (below) and do that which is good in Thy sight.' Both Jewish and Christian statements echo *Ps.* 135:6.

"The petition for daily bread which follows continues the Messianic thought. He who has faith and seeks the kingdom of God need have no fear for the day's sustenance or the morrow's. *Mechilta Vayassa* 3 (edit. Lauterbach, vol. 2, p. 103) reads: 'Rabbi Eleazer (of Modin) used to say: He who has enough to eat for today and says, What shall I eat tomorrow? behold, he is of little faith.' *Sotah* 48b records a similar dictum: 'Rabbi Eliezer the Great declares: Whoever has a piece of bread in his basket and says, What shall I eat tomorrow? belongs only to those of little faith.' The words 'daily bread' are the *lehem hukki* ('mine allotted bread') of *Prov.* 30:8.

"The next sentence offers some difficulties, since the versions differ as to whether it is 'sins' or 'debts' that are to be forgiven. . . .

" . . . The next phrase, . . . 'Lead us not into temptation,' is found in the Orthodox daily prayer-book as part of the morning prayers recited at the beginning of the daily service. The passage is taken from *Ber.* 60b and reads: 'O lead us not into the power of sin or of transgression or iniquity or of temptation. . . .'. There is a similar statement in *Ber.* 16b, and the idea is frequent in Jewish prayers. . . .

"The closing doxology in *Matthew* ('Yours is the kingdom') is taken directly from *I Chron.* 29:11, which is used in the Orthodox Jewish liturgy at the time when the Scroll of the Torah is taken from the Ark. This doxology is not a general conclusion, but is connected with the prayer for forgiveness."

<sup>9</sup> For example, Rabbi Levy, in the article just cited (fnnt. 8) also states, "(The) Lord's Prayer is a series of petitions which is given this name because it was taught by Jesus as an example of the proper kind of prayer to be addressed to God. It is perhaps the most important prayer in the whole liturgy of the Christian faith. (Emphasis supplied) . . . From the discussion. . . it can be seen that the Lord's Prayer owes much to Jewish thought. Many of its ideas are Jewish, and its phraseology closely resembles that uttered by Jewish teachers.

Therefore, not being "denominationally neutral", it falls more strongly than does the Regent's Prayer within the prohibition of *Engel v. Vitale*.

But the choice and grouping of the phrases is original and the whole bears the mark of the special Christian theology. It therefore is a Christian rather than a Jewish prayer."

Another (non-Jewish) authority has said "... 'if two say the same thing it is not the same,' for while the Lord's Prayer can be used today by every Jew who may know nothing and wish to know nothing of Christ, yet it can only be properly offered by those who pray in the name of Jesus, and who know what is meant by praying in the name of the Crucified." J. Hausslater in *The New Schaff-Herzog Religious Encyclopedia* (Funk & Wagnalls, 1910), vol. 7, p. 21.

Another has held, petulantly, that "The sources of the prayer have often been discussed, and rabbinical parallels to the different petitions have been pointed out by ... Lightfoot, Schoettgen, Vitringa, Wetstein, and others. But the parallels do not carry us very far. ... Indeed, the prayer is free from anything that can be called purely Jewish." *A Dictionary of the Bible*, Hastings (Scribner's, 1950), vol. III, p. 142.

The Petitioners are not unaware of the contrary expert testimony given in *Schempp v. School District of Abington Township*, et. al., 177 F. Supp. 398, giving it as the opinion of the rabbis there testifying that the Lord's Prayer is acceptable to those of the Jewish faith. But even if these experts are correct, "acceptable" is not "comfortable"; and the prayer has a very strong Christian background. Furthermore, Petitioners' counsel is a Jew, and believes that every man is his own rabbi; counsel does not agree that the prayer is an acceptable prayer for Jews; counsel's personal feeling throughout his school days was that the "Lord" referred to in the title of the prayer was Jesus, and that the prayer was being offered by the school in fulfillment of the injunction of Jesus himself; as a Jew, counsel never felt right in following Jesus' direction as to use of a particular prayer, in spite of his agreement with most of the thought and spirit of the prayer; consequently counsel usually did not pray.

#### 4. The Bible Is Sectarian

Like the Lord's Prayer, the Bible is also sectarian. It is not accepted by Mohammedans, for example, whose holy book is the Koran nor by Buddhists, who have their Trypitaka.<sup>10</sup>

<sup>10</sup> Hawaii has probably 100,000 Buddhists in a population of half a million, according to Borden, in Hawaii, the 50th State, (McRae, Smith Co., 1960).

Apparently Buddhists are reluctant to contribute statistics. No figures are found in the World Almanac as to their numbers in Hawaii, and the Encyclopedia Britannica simply states "The Roman Catholic and Buddhist religions were the leading faiths in Hawaii at mid-20th-century" (1960, vol. 11, p. 267.)

Buddhism has various forms. Mahayana Buddhism, no doubt the dominant Hawaiian form, is polytheistic. Hinayana Buddhism is agnostic. Maurice Percheron in "Buddha and Buddhism" (Harper, 1954) says, "It may be acknowledged then that (Hinayana) Buddhism inherited a part of its spiritual aspirations from Brahmanism. What is peculiar to it is the authority given to man to gain his salvation without divine intervention. The ground had already been prepared by the fall of the old Vedic gods, which proved that a place in the celestial empyrean was not held in perpetuity. A Nietzsche before Nietzsche, the Buddha might well have uttered the axiom 'The gods are dead, man grows.' He attaches so much importance to the individual as to state outright that in order to gain Nirvana even the gods must undergo their last incarnation in the human state."

The "Encyclopedia Britannica" (1960) vol. 4, p. 326 states, "Four questions are recorded which it was held the Buddha had refused to answer. These are, whether the universe is eternal or not, whether it is finite or not, whether life is the same as the body, and whether one who is emancipated, (a Tathagata) exists after death. These are undetermined questions, and the fact that they were left unanswered has led to the system being called agnostic."

The polytheistic spirit of Mahayana Buddhism is indicated by Percheron in "The Marvelous Life of the Buddha" (1960), p. 18: "In Mahayana Buddhism Shakyamuni, (the Buddha) loses his historical character. He gives way to a pantheon of buddhas, who are considered redeemers and are endowed with divinity."

In fact, we can easily strike more closely to home than that, for depending upon which version of the Bible is being discussed, whether the Douay, the American Standard, the Revised Standard, the King James, the Jewish Publication Society Bible (which seems to have omitted the entire New Testament), that Bible is not acceptable to numerous sects both Christian and Jewish. (These two religions are mentioned simply by virtue of being "major" in terms of numbers in the United States). Members of the Jewish faith, for example, cannot accept any Biblical version containing the New Testament; Christians cannot accept a Bible which does not contain it.<sup>11</sup> Even if the Bible reading which is enjoined by the Rule of the school authorities in the instant case is always selected from the Old Testament, this selection is yet sectarian, and its reading constitutes a religious ceremony, interfering with the free exercise of the Petitioners' non-belief in a religion. As far as the Petitioners are concerned, the implication which the ceremony holds, is strongly to the effect that the Petitioners' non-belief in a religion (it is not lack of faith; Petitioners have strong faith in the moral principles listed in their petition for mandamus (R. 4)) is suspect, alien, of ill repute,

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<sup>11</sup>In *Schempp v. School District of Abington Township, et. al.*, 177 F. Supp. 398, the Pennsylvania District Court, in an Opinion by Biggs, J., after a painstaking inquiry, and a thorough examination of the expert evidence presented made certain detailed findings as a matter of law concerning the nature of the Holy Bible, and found that it is a sectarian document—"We find the operative facts in the instant case to be as stated by (the witnesses, including the experts)". The experts had made the statement paraphrased in the text above. They were Dr. Solomon Grayzel, a learned rabbi, Editor of the Jewish Publication Society, publisher of the Holy Scriptures according to the Masoretic Text, and Dr. Luther A. Weigle, Dean Emeritus of the Yale Divinity School and Chairman of the Committee for the Preparation of the Revised Standard Version. The discussion is most enlightening. See pp. 401-2 and esp. notes to the case nos. 13-21.

of a lesser moral quality than belief in some one religion, and to be condemned; none of which they admit, all of which they strenuously dispute.

**5. The First Amendment Prohibition Is an Absolute Prohibition. *Torcaso*; *Engel*; *West Virginia v. Barnette*.**

We are a secular democracy. The First Amendment was a most auspicious addition to the Constitution. Properly observed, by favoring no one system of belief over others, it favors all systems of belief, and all inquiry into belief. It seems that if one believes in the virtue of a free intellect, and if one believes that the Founding Fathers did also, then it follows that the First Amendment prohibition was meant to be an absolute prohibition,<sup>12</sup> and is best observed as an absolute prohibition.

In *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982, as in *Engel v. Vitale*, 370 U.S. 421, and as (in terms) in *Everson*; the court held (reiterating the language

<sup>12</sup> See Mr. Justice Rutledge's dissent in *Everson v. Board of Education*, 330 U.S. 1, 33-42. In *Engel v. Vitale*, Mr. Justice Douglas called the following comment of Mr. Justice Rutledge "durable First Amendment philosophy": "The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both with and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from interferences, by the state." "Sustenance" obviously does not consist of money alone.

In addition, Mr. Justice Douglas stated (p. 443 of *Engel*): "The *Everson* case seems in retrospect to be out of line with the First Amendment."

of *Everson*, "Neither (a state nor the Federal Government) can pass laws which aid one religion, aid all religions, or prefer one religion over another." Thus, the Petitioners urge that reading the sacred writings of the Christian or Jewish religion,<sup>13</sup> or reciting the Lord's Prayer<sup>14</sup> would be a governmental preference in favor of Christianity or Judaism, thus denying those with other religious views the benefit of the "wall of separation of Church and State" called for in *Everson* and *Torcaso*, and thus "sanctioning official prayers" as expressly prohibited in *Engel v. Vitale*, *supra*, at 435.

In *Engel*, it was also pointed out (p. 429) that

"By the time of the adoption of the Constitution . . . many Americans . . . knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its *official stamp of approval upon one particular kind of prayer or one particular form of religious services*. . . . Under (the First) Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions<sup>3</sup> of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." (Emph. supp.)

Though this language was applied to the Regent's prayer in *Engel*, yet the Lord's Prayer, duly prescribed by law in

<sup>13</sup> See fnnts. 14, *supra*.

<sup>14</sup> See fnnts. 4, 9 *supra*.

the Maryland schools,<sup>15</sup> by that prescription becomes just as much an "official prayer" as any "composed" prayer, and certainly the entire service, carefully outlined by law, consisting of the prayer plus Bible reading is "one particular form of religious service."

In the Second Flag Salute Case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, it was held:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or require free citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

In *Torcaso v. Watkins*, *supra.*, it was stated:

"Neither (a state nor the Federal Government) can force nor influence a person 'to . . . profess a belief or disbelief in any religion'. No person can be punished for entertaining or professing religious beliefs or disbeliefs. . . . (Emph. supp.)"

" . . . Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on

<sup>15</sup> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 1185.

a belief in the existence of God as against those religions founded on different beliefs."<sup>16</sup>

**6. Factors Relating to Compulsion are "Activated" by a Parent Acting to Have a Child Excused from the Ceremony**

To require a child to obtain written permission from his parents to be excused from the religious ceremony, indeed, merely to require a child to absent himself from the ceremony, whether by coming to class on time and then leaving, or by attending class each day after the performance of the ceremony is completed, or even to metaphorically absent himself by sitting silent or standing silent while others pray or listen, is to require him to "confess by word or act" and is to "force or influence" him "to . . . profess a belief or disbelief in (a) religion."

This argument is offered in spite of Mr. Justice Douglas' feeling, expressed in his concurring opinion, that *Engel* did not involve compulsion in any way. The very fact that a child brings a note from his parent requesting either that he be excused from remaining in the room, or perhaps only excused from standing, or from reciting, will, in most instances, it is respectfully suggested, cause either subtle or outspoken disapproval from some teachers regardless of any bona fide steps which may be taken by school authorities, to prevent such disapproval. School teachers are not notably broad minded as a group. As a group, they even have their fair share of bigots and religious fanatics of varying degree. And if this can be

<sup>16</sup> *Ftnt. 11* at 81 S. Ct. 1684 states, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. (References cited)."

conceded, then it would follow that disapproval will equal compulsion in many cases.

A child's fellow students can be expected to be no better. Some may in future years turn out to be judges, physicians, morticians, bread salesmen, appliance repairmen, and members of other such learned professions; others, surely, will become panhandlers, con-men, lawyers, newspapermen, and members of other callings of like ill-repute; at school age all are mixed together and all are without benefit of the maturity, further education and wisdom which will in some degree act on all at a future time. Consequently, this disapproval, which may surely be expected to attend the proffer of permission to be excused from the exercises, likewise will, and even more strongly, probably, be expressed in ways constituting compulsion, or pressure to conform.

#### **7. Both the Establishment and Free Exercise Clauses Are Invoked.**

The *Torcaso* case, and the language quoted above (pp. 20-21), was based on the Establishment Clause; the *Barnette* case made no statement as to which First Amendment clause was invoked but would seem to have dealt with the Free Exercise Clause<sup>17</sup>; the *Engel* case stood at least upon the Establishment Clause.<sup>18</sup>

(*McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 1153, 1218, 6 L. Ed. 2d 393 seems to indicate that the question of which clause is involved concerns particularly the question of *standing* to maintain the action; that where

<sup>17</sup> For example, Mr. Justice Murphy, concurring, said "official compulsion to affirm what is contrary to one's religious belief is the antithesis of freedom of worship ..."

<sup>18</sup> See particularly pp. 430, 431.

the litigant's own religious freedom was not infringed by Sunday closing laws, the Free Exercise Clause could not be invoked: that if an establishment of religion by the government was effected, and this effectuation was alleged to cause the litigant economic disadvantage, he had standing to challenge the statute causing him that disadvantage.)

Both clauses, it is urged, may be invoked by the Petitioners here, and both clauses prohibit the practices complained of.

In *McGowan*, Mr. Justice Frankfurter, concurring, said

"... with foresight, those who drafted and adopted the words, 'Congress shall make no law respecting an establishment of religion,' did not limit the constitutional proscription to any particular, dated form of state-supported theological venture. The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a State, may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served, or because a majority of its citizens, holding that belief are offended when all do not hold it.

"With regulations which have other objectives the Establishment Clause, and the fundamental concept which it expresses, are not concerned. These regulations may fall afoul of the constitutional guarantee against infringement of the free exercise or observance of religion. Where they do, they must be set aside at the instance of those whose faith they prejudice. But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied.

"... If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCullum*. Or, if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand. . . ."

In *McGowan* it was determined that Sunday closing laws were health and welfare statutes, and not, in intrinsic intent, an incursion by the states into the area of religious observance.

However, in the case at hand, by the rules laid down by Mr. Justice Frankfurter, both the Establishment Clause is violated by the Defendant School Board's Rule which does not implement any other substantial interest than the promotion of belief; and the Free Exercise Clause, which

is violated by virtue of the adverse effect which the Rule and practice complained of, has on the Infant Petitioner due to his non-belief in a religion, and which Rule and practice are here challenged by one "whose faith they prejudice."

Mr. Justice Douglas, in dissenting in *McGowan* on the application of First Amendment principles to the facts there said,

"But those who fashioned the First Amendment decided that if and when God is to be served, His service will not be motivated by coercive measures of government. 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'—such is the command of the First Amendment . . . . This means, as I understand it, that if a religious heaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.<sup>19</sup> This necessarily means,

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<sup>19</sup> This statement, it would seem, is itself an answer to Mr. Justice Douglas' disturbing contention, raised in *Engel v. Vitale*, that this Court, state legislatures, and the Houses of Congress, are in violation of the Establishment Clause in opening their sessions with a prayer conducted by a chaplain or other person on the public payroll. This problem, of ceremonial invocations, also, apparently, was a principal factor in causing Mr. Justice Stewart to dissent in the same case. But Congress, state legislatures, and this Court are autonomous bodies. They are bodies which clearly have large inherent or explicit powers giving them the right to establish their own rule of procedure, and if they wish, to establish, for example, rules which they themselves will voluntarily observe; as to dress, time of meeting, the decoration of their furniture and their chambers, and of the ceremonies which they, as an autonomous group, wish to observe in the conduct of their business. The members of Congress can, it seems, neither force me to attend their meetings as a spectator, nor, if I do attend, to participate in their prayers, but I, not having been

*first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over

elected to that august body, and not being a member thereof, could not, I would think, tell them not to pray, nor what to wear, nor where to sit, nor what parliamentary rules to adopt. Likewise, if I were a member of Congress, I could not prevent it from collectively, as a voluntary body of individuals, deciding, by proper parliamentary procedure, to pay a chaplain to conduct prayers out of moneys given it to use, in its unrestricted discretion, for the ordinary conduct of its daily business and proceedings. A child compelled to attend school under compulsory public education laws is in a different situation from one who volunteers for public service. Certainly there would be no problem if the chaplains were paid by the members of Congress from their private funds, or if they were unpaid.

Insofar as no finite increment in teacher's salaries nor in educational capital costs can be attributed to the conduct of prayer services, the Petitioners deny that their right to challenge the ceremonies is based on any additional costs being thereby added to the cost of public education. They believe too fervently in the absolute importance of secular democratic schools to believe that only monetary aid is encompassed within the Establishment Clause prohibition.

Petitioners do not deny however, that the provision of military chaplains in the armed forces, where service is compulsory, and where the members of those forces do not themselves determine the existence or establishment of the services of chaplains, of chapels, of religious services and the like, may be unconstitutional.

Yet, it certainly can be argued that the provision of paid chaplains as a matter of convenience and comfort for the military men they serve is no more unconstitutional than the provision of blankets, of shoes, of a post exchange or a post library. No one, presumably, is forced by his superior officers to avail himself of any of these facilities, and the use of the post chaplain by an individual is no more the conduct of a religious ceremony for the group as a whole, than is individual use of the library. A distinction can easily be drawn, in this instance, between use of religious facilities because of an order from above or a request from below. Moreover, the school is only a part of a child's environment; an isolated army post may be a military man's entire environment, and all of his normal needs must be drawn from that environment.

those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the state may not require anyone to practice a religion or even any religion; and *fourth*, that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters (West Virginia . . . v. Barnette . . . McCollum v. Board . . .), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics."

#### 8. Religious Discrimination, or Religious Segregation (Brown v. Board of Education).

Moreover, wholly aside from constitutional provisions expressly applicable to religion, the Equal Protection Clause of the Fourteenth Amendment prohibits any significant state discrimination which is not based on reasonable classification. In the cases involving racial segregation (*Brown v. Board of Education* (1954), 347 U.S. 483, 74 S. Ct. 686), this court has emphasized the importance of equal treatment in our public schools. The Court observed that formal education is "perhaps the most important function of state and local governments", is "the very foundation of good citizenship," and is virtually indispensable to individual success in life.

"Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (*Brown v. Board, supra*; 347 U.S. at 493; 74 S. Ct. at 691.)

The court then considered the effect of racial segregation upon children and found that it:

"... generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (347 U.S. at 494, 74 S. Ct. at 691.) (Brackets by the Court.)

The Petitioners contend that the religious discrimination present in classroom reading of the Bible, and particularly that involved in excusing or dismissing one or several children from the class during such reading would be wholly as severe in its social and psychological effects as the racial discrimination which was before the Court in the segregation cases, and that such segregation on a religious basis is wholly prohibited by the decision in the segregation cases.

To call upon children to participate in prayers which are contrary to their parents' belief (or in the alternative to require them to profess their non-belief) is thus a material, not a mere incidental, encroachment upon the separation of Church and State. Especially in the case of very young children, their right to absent themselves during such prayers would seem to be inadequate protection from the very real though subtle pressure which the endorsement of school and teacher would produce.

## 9. Jonah, the Whale and Ninevah's Repentance; Jonah Sheds a Tear for a Gourd

*Engel v. Vitale*, judging from the public reaction, was severely traumatic reading for many citizens. Following the decision, legislation to repeal the First Amendment was proposed in Congress,<sup>20</sup> hands were wrung in pulpits across the land, the Baltimore City Council undertook to advise the Senate what to do,<sup>21</sup> and letters were written to newspaper editors throughout the country suggesting that the Republic was tottering. But for what? For a prayer<sup>22</sup> conducted daily, automatically, and in public, not in the heart.<sup>23</sup> For this, many are ready to cancel the first of the first ten safeguards of the rights of the nation's people.

One is reminded of the story of Jonah,<sup>24</sup> that foolhardy and self-centered man, who with great reluctance, and only after his tribulation in the belly of the fish, finally heeded God's word, and went to Ninevah to preach to its inhabitants as he had been commanded to do. To Jonah's great surprise, the people of Ninevah repented; they "turned from their evil way", and so "God repented of the evil that he had said he would do unto them; and he did it not." Jonah, however, was "displeased . . . exceedingly . . . and he was very angry." After some words

<sup>20</sup> New York Times, June 27, 1962 pp. 1, 20; June 28, 1962, p. 17.

<sup>21</sup> The Sun (Baltimore), June 27, 1962; July 13, 1962.

<sup>22</sup> Napoleon is reported to have said, "Do you wish to see that which is really sublime? . . . Repeat the Lord's Prayer" John S. C. Abbott, *The History of Napoleon Bonaparte* (1855) . . . But A. Buttrick in *So We Believe, So We Pray* (1911) comments, "Apparently that was all he did; he only repeated it. So it left no deep mark on his conduct."

<sup>23</sup> " . . . thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father, which is in secret; . . ." Matt. 6:6.

<sup>24</sup> Jonah 1-4.

with God, he went to sit on a hill on the east side of the city to see what would become of Ninevah, apparently believing he may have changed God's mind. As Jonah sat in the booth he had made, God caused a gourd to grow over it, for shade. Then God sent a worm to destroy the gourd, and when "the sun beat upon the head of Jonah" he was enraged. "God said to Jonah, Doest thou well to be angry for the gourd? . . . Thou hast had pity on the gourd, for which thou hast not labored, neither madest it grow; which came up in a night and perished in a night: And should I not spare Ninevah, that great city, wherein are more than sixscore thousand persons that cannot discern between their right hand and their left hand; and also much cattle."

And so, the critics of the First Amendment. They weep for a prayer and religious practice in the schools, which should never have been allowed to become established in the first place, and which is of minor importance to the moral life of the people; but they do not even blink at the threat which the practice poses to the Constitution, to the Bill of Rights, and consequently to the welfare of the nation's 180 million inhabitants which these institutions fundamentally protect.

### CONCLUSION

The Petitioners request that the judgment of the Maryland Court of Appeals be reversed, and the case remanded for such other proceedings as are proper in a mandamus action.

Respectfully submitted,

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